91-919

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FREDERICK GEORGE BRIGHT – PETITIONER

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. – RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the district court and the United States Court of Appeals err in determining that the material summary judgment evidence and the reasonable inferences that could be drawn from it could not support a jury verdict in favor of Petitioner when it granted a summary judgment adverse to Petitioner, concluding that overtime compensation for on-call time should be denied because on-call time was spent predominantly for Petitioner's benefit rather than that of the Respondent?

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FREDERICK GEORGE BRIGHT – PETITIONER

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. – RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Frederick George Bright, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which opinion affirms a summary judgment of the United States District Court for

the Southern District of Texas, and in support of such requests Petitioner submits the following.

OPINIONS

Final Judgment of the United States District Court for the Southern District of Texas was signed on August 3, 1988, as was its Memorandum on Summary Judgment, which appear in App. A and B, respectively. The United States Court of Appeals filed its en banc opinion reported as *Frederick George Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991), appearing as App. C to this Application.

JURISDICTION

1. The Final Judgment of the United States District Court for the Southern District of Texas was signed on August 3, 1988, as was the Memorandum on Summary Judgment, which appear in App. A and B, respectively.

2. The decision of the United States Court of Appeals for the Fifth Circuit was dated July 2, 1991, and appears in App. C to this Petition.

3. Petitioner's Petition for Rehearing was overruled by the United States Court of Appeals for the Fifth Circuit on August 12, 1991, as set forth in App. D.

4. Petitioner believes that this Court has jurisdiction to review the decision of the Court of Appeals by virtue of 28 U.S.C. § 1254(1); additionally, the Court of Appeals' decision conflicts with the following applicable decisions of this Court:

(a) Summary Judgments: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1985);

Celotex Corporation v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

(b) Fair Labor Standards Act — On-Call Compensation: *Skidmore v. Swift & Co.,* 323 U.S. 134, 89 L.Ed. 124, 65 S.Ct. 161 (1944); *Armour & Co. v. Wantock,* 323 U.S. 126, 89 L.Ed. 118, 65 S.Ct. 165 (1944).

STATUTORY PROVISIONS

28 U.S.C. § 1291 as set forth in App. E.

28 U.S.C. § 1337 as set forth in App. F.

28 U.S.C. § 1254(1) states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

29 CFR § 785 as set forth in App. G.

29 U.S.C. § 207(a)(1) as set forth in App. H.

29 U.S.C. § 216(b) as set forth in App. I.

STATEMENT OF THE CASE

Jurisdiction of United States District Court for the Southern District of Texas was conferred by 29 U.S.C. § 216(b) and 28 U.S.C. § 1337. The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner, Frederick George Bright, brought suit against Respondent, Houston Northwest Medical Center Survivor, Inc., on September 8, 1983, to recover compensation for on-call time. Mr. Bright was employed by the hospital from April 1981 through January 21, 1983. Early in February 1982, approximately one year prior to the termination of Mr. Bright's employment by the hospital, he was given a pager previously worn by his predecessor and told that he would be required to wear that pager at all times, would be on-call at all times that he was not at the hospital, and, further, that he would be required to report

to the hospital within approximately 20 minutes from the time he was page. Mr. Bright's duties at the hospital required that he be able to repair and maintain complex biomedical equipment such as defibrulators, infusion pumps, hypothermia units, cardiac monitors, blood pressure monitors, various types of vacuum devices, incubators and electrosurgical equipment.

Mr. Bright was compensated for his regularly scheduled time at an agreed rate, and in addition, on the numerous occasions that he was called to return to the hospital, he received four hours credit on his time sheet for each such call. Mr. Bright's on-call duty required that he be available 24 hours a day, seven days per week, 365 days per year, in a condition that he could determine what was wrong with or what had failed in a piece of biomedical equipment and, thereafter, promptly make appropriate repairs to that equipment.

Mr. Bright, during the on-call time, could visit friends, go to movies, eat and sleep as he chose, but always constrained and limited in his actions to the 20 minute on-call radius, and that he be continuously unimpaired.

ARGUMENT AND AUTHORITIES

Summary Judgment Component

"The Judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R Civ Proc 56(c), *Anderson v. Liberty Lobby, supra; Matsushita v. Zenith Radio, supra; Celotex Corporation v. Catrett, supra.* Petitioner did not fail to heed the obligations imposed upon him by Fed R Civ Proc 56(e) as is clear from his Affidavit, App. J, and from the recitation of the facts as set forth in the opinions of the district court and the court of appeals, App. B and C, respectively. This Court has repeatedly stated that the

nonmoving party in a motion for summary judgment battle must establish that there is a genuine issue of a material fact. Materiality, at a minimum, carries with it a requirement that the responding party be adversely affected. Additionally, for the issue of fact to be genuine, there must be something more than "what if" speculation.

In deciding abstract concepts the Court must look to applicable statutory or common law to determine in this case the burden of proof imposed upon Petitioner to "get to" the jury. Once Petitioner's burden of proof to get to the jury is established, it follows that, if Petitioner comes forward with facts that fall within the gambit of what is material to that burden, a court in reviewing a motion for summary judgment must view those facts and inferences in favor of the party resisting the motion.

In 1986, this Court in *Anderson*, *Matsushita* and *Celotex* restated the existing summary judgment practice and, in addition to that restatement, made it clear that

significant burdens were placed on a party responding to a motion for summary judgment, and that the motion could not be defeated by "what if" sniping at the moving party's motion.

In 1991 this Court reviewed by written decision at least seven cases that came before it as a result of motions for summary judgment. *Equal Employment Opportunity Commission v. Arabian American Oil Co.,* 499 U.S. ____, 113 L.Ed.2d 74, 111 S.Ct. ____ (1991); *Feist Publications, Inc. v. Royal Telephone Service Co., Inc.,* 499 U.S. ____, 113 L.Ed.2d 358, 111 S.Ct. ____ (1991); *Astoria Federal Savings & Loan Ass'n v. Solimino,* 501 U.S. ____, 115 L.Ed.2d 96, 111 S.Ct. ____ (1991); *Wilson v. Seter,* 501 U.S. ____, 115 L.Ed.2d 271, 111 S.Ct. ____ (1991); *Renne v. Geary,* 501 U.S. ____, 115 L.Ed.2d 288, 111 S.Ct. ____ (1991); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. ____, 115 L.Ed.2d 321, 111 S.Ct. ____

(1991); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ____, 115 L.Ed.2d 447, 111 S.Ct. ____ (1991).

In each of these cases the 1986 rules were consistently applied. In *Masson*, a libel suit, this Court after establishing the Plaintiff's burden in this type litigation, thereafter proceeded to determine whether or not Masson, the plaintiff and petitioner before the Court, in resisting the motion for summary judgment, had brought forward facts that were material and that would have allowed him to go to the jury or to survive a motion for instructed verdict. Most significant to this appeal is that portion of this Court's decision in *Masson* that dealt with various passages from the allegedly libelous publication. In each instance this Court, after setting out what Masson believed to be the libelous "fact," then asked the question, could a reasonable jury in viewing or listening to that fact, conclude that it was false, expose that person to hatred or contempt, and that it was made with knowledge of its falsity

or reckless disregard. The Court, after having found that the fact on which the plaintiff relied met such standard, terminated its inquiry because the issue was now one for a jury to weigh.

The court of appeals in this case either failed to apply the standard established by this Court, or applied them improperly.

On–Call Component

In 1944, this Court in *Armour & Co. v. Wantock*, 323 U.S. 126 and *Skidmore v. Swift & Co.*, 323 U.S. 134, reviewed and decided issues that are, some 47 years later, before the Court again in this petition.

Skidmore and *Armour* are dispositive of the issues in this case notwithstanding the fact that the court of appeals believes that they do not mean what they say.

The plaintiff's burden of proof in a claim for overtime compensation based upon on–call time apparently requires that the plaintiff establish the following:

(a) employer-employee relationship, (b) that the employee was on-call, (c) compensation was not paid for that portion of the on-call time for which compensation is claimed, and (d) that while the employee was on-call and not being compensated, that all or a portion of that time was spent predominantly for the employer's, rather than the employee's, benefit.

29 U.S.C. § 207(a)(1) provides that with only limited exceptions an employer must compensate employees at a rate not less than one and a half times the employee's regular rate for workweek hours in excess of 40. App. H. Exceptions to § 207 are narrowly construed. *Donovan v. Willox, a division of Halliburton*, 550 F.Supp. 855 (S.D.Tx. 1982); *Harp v. Continental/Moss*, 259 F.Supp. 198, *aff'd* 386 F.2d 995 (M.D.Ala. 1966).

The Fair Labor Standards Act contains no definition of "work" and only a limited definition of "hours worked." 29 CFR § 785.6, App. G.

"Working time" is a question of fact to be determined by common sense and general concepts of employment. *Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123,* 321 U.S. 590, 645 S.Ct. 698 (1944); *Wertz v. McGhee,* 244 F.Supp 412 (E.D.S.C. 1965); and *Central Missouri Telephone Co. v. Conwell,* 170 F.Supp. 641 (8th Cir. 1948), App. G. There is no dispute that Mr. Bright was employed by the hospital, that he was on-call for approximately the last year that he was employed by the hospital, and that he was not compensated for all or a portion of the on-call time. We are thus left with the last factor: was all or a portion of the on-call time predominantly for the employer's benefit? Notwithstanding the court of appeals' desire to establish a bright red line, no such test exist.

In *Armour,* firefighters at Armour's plant were required to remain on the employer's premises after a nine hour shift from 5:00 p.m. to 8:00 a.m. the next morning.

During this time, the employees were subject to call but not engaged in any specific work. They could not leave the premises except with the employer's permission. During this on-call time, the employees could do as they chose. The district court found that their sleeping and eating time was not compensable, but that the rest of the time was. This Court affirmed that finding. In *Skidmore*, the companion case, employees that performed fire fighting maintenance elevator operation and relief services had regular hours of employment for which they were paid. However, in addition, three and a half to four nights a week the employees remained in the company fire hall on-call to answer alarms or to reset the sprinkler system. There were no specific tasks to perform during this on-call time, and the employees could use the time as they saw fit except in the rare instance where they had to answer an alarm or reset a sprinkler. The district court and court of appeals held that as a matter of law the on-call time was

not compensable. This Court, as part of its opinion rejecting this conclusion, observed, among other things, "in general, the answer depends 'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work'." "Hours worked are not so limited to the time spent in active labor but include time given by the employee to the employer." In both *Skidmore* and *Armour* it is clear beyond peradventure that this Court established that on-call or waiting time cases are to be decided on a case by case basis. Notwithstanding that guidance, the court of appeals tries to limit *Skidmore* and *Armour* to the exact facts of those cases by deciding that if the facts are slightly different, and further, if those different facts could produce different results, it is legitimate for the court to derail the fact finding process and to grant a summary judgment. The

court of appeals tries to distinguish this case from *Armour* and *Skidmore* by saying that the 20 minute leash constitutes such a clear distinction as to allow a determination to be made as a matter of law that the benefit to the employee at all times during on-call time predominated over the benefit to the employer. In both *Armour* and *Skidmore*, the employees were free to do what they chose to do at all times that they were not sleeping, eating or doing one of the on-call duties. In this, *Armour, Skidmore* and this case are identical. The only distinction is the size of the area within which the employee must remain. In *Armour* and *Skidmore* the employee was required to remain in or about a fire hall. In this case, while the area is larger, the employer required Mr. Bright to live within a circle having a radius of 20 minutes from the hospital for a year. If it is fair to say that the circle is larger, and because of this the employee can do more, it is just as fair to observe that in those cases where the area of restraint was smaller, there

were times when the employee was completely relieved of any on-call responsibility. It is also fair to observe that while Mr. Bright could do whatever there was to do within the circle, those things that were done would have been done had there been no restraint, there were many activities that simply could not be engaged in at all, as was the case in *Skidmore* and *Armour*. Additionally, and while the court of appeals ignores it, the restraint would not have been imposed unless the employer was deriving a substantial benefit from the constant availability of Bright's services. Apparently there was a great deal of benefit to the employer because of the need to have Mr. Bright's availability 24 hours per day for a year. All of these considerations should have been weighed by a jury. If the test requires a determination of whether the time was used predominantly for the employee's or employer's benefit, each side of the equation must be evaluated. The court of appeals did not do this. A fact finder could reasonably

determine that while Mr. Bright got some enjoyment out of the on-call time, the employer's benefit was greater still.

The court of appeals attempts to justify the inconsistency of its decision with *Armour* and *Skidmore* by reliance upon its decisions and *Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987); and *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245 (5th Cir. 1986).

The best thing to be said about *Halferty*, *Brock* and *Rousseau* is their consistency in disregarding *Skidmore* and *Armour*.

There is, of course, more to the decisions than that. *Rousseau* provides little support for the decision in Bright because the primary subject of the appeal was a decision after a trial on the merits. The court of appeals did not say that had the decision been in favor of the employees that it could not have stood, just that the facts which it recited

in support of the district court's decision were sufficient to support that decision.

Brock was appealed after a trial on the merits based upon stipulations of the parties. The court of appeals found that the freedom of the employees in *Brock* was greater than that in *Rousseau* and, not surprisingly, reversed the decision of the district court and rendered judgment adverse to the employees. It should be observed that in *Brock* the employees volunteered for the position giving rise to their waiting time claim, there was a stipulation as to the parties' working agreement, the employees could relieve themselves from the on-call obligation at any time they chose, and the employees could leave the work site at will by trading on-call time with another employee. Obviously the importance to the employer of having the constant availability of the employee was substantially less in *Brock* than in the instant case.

Halferty also represented an appeal from a trial on the merits. The court of appeals, building on the momentum established by *Brock, Rousseau* and other of its opinions, essentially concluded that for an employee to obtain compensation under the waiting to be engaged doctrine, that the employee have almost no freedom whatsoever during the waiting time. Neither *Skidmore* nor *Armour* had or suggested such a requirement. Accordingly, for still this additional reason, *Brock, Halferty* and *Rousseau*, as well as Bright, are inconsistent with this Court's benchmark decisions.

In *Skidmore* and *Armour*, the Administrator of the Department of Labor, App. G, said that resolution of the waiting time on-call issue requires a determination of whether or not the benefit to the employee or employer predominated. The court of appeals gave no consideration at all to this element. It is undisputed, but not discussed by the majority opinion, that the on-call policy was for the

hospital's sole benefit, and that it guaranteed maintenance of the hospital's equipment, the discharge of its duty to its patients, and the benefit attendant to not having to hire and train additional employees. A jury is uniquely capable of evaluating whether or not the on-call time was predominantly for the benefit of the employee or the employer. There is no question that the substantive law is easily capable of being identified, and the facts that are material to the discharge of the burdens so established easily identified.

Frederick George Bright's Petition for Writ of Certiorari brings before this Court a decision that is inconsistent with controlling decisions of this Court and that attempts to expand erroneous precedent. These errors and the injury to Frederick George Bright require a reversal of the Court of Appeals' decision in order that Petitioner may have his day in court before a jury of his peers.

CONCLUSION

Frederick George Bright prays this Court issue its Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Fifth Circuit and remand this matter to the District Court for trial.

Respectfully submitted,

MAURICE BRESENHAN, JR.

Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FREDERICK GEORGE BRIGHT,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. H-83-5379**
	§	
HOUSTON NORTH-WEST MEDICAL CENTER SURVIVOR, INC.	§	
	§	
Defendant.	§	

FINAL JUDGMENT

It is adjudged that Frederick George Bright take nothing by his action against Houston Northwest Medical Center Survivor, Inc. Each party shall bear its own costs and attorney's fees.

Signed on August 3, 1988, at Houston, Texas.

(signature)
Lynn H. Hughes
United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FREDERICK GEORGE BRIGHT,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. H-83-5379**
	§	
HOUSTON NORTH-WEST MEDICAL CENTER SURVIVOR, INC.	§	
	§	
Defendant.	§	

MEMORANDUM ON SUMMARY JUDGMENT

Frederick George Bright has sued his former employer, the Houston Northwest Medical Center Survivor, Inc., (Northwest) for overtime wages under the Federal Labor Standards Act. 29 U. S. C. § 201. Accepting all of Bright's pleaded facts as true, he has failed to make out a prima facie case that the time he spent on call for

Northwest constituted working time within the meaning of the statute; therefore, Northwest will be granted a summary judgment.

Facts.

Bright was hired by Northwest in April 1981 as a biomedical technician responsible for maintaining medical patient care equipment. He worked a forty-hour week, and his starting hourly rate of $9.50 was increased to $10.50 in 1983. In April 1982, Bright was promoted to a managerial position, which entailed, with one exception, his performing essentially the same duties as before. The additional task was that Bright had to wear an electronic pager (which he had been using since February) so that he could be contacted by the hospital to make emergency repairs at any time. During the year Bright worked as manager of the hospital's biomedical equipment repair

service, he would typically be paged three to four times a week to service equipment.

When Bright was asked to assume the new position and the accompanying responsibility, he did not sign a new employment contract. Rather, he was told by his supervisor, Jim Chatterton, that he would receive four hours of compensatory time for every beeper call he had to answer. Chatterton said that at the next budget meeting he would secure monetary compensation for the on-call duty, but at present there was no hourly pay for this duty. After the budget meeting, at which Chatterton failed to obtain monetary compensation, Bright continued to work, as agreed, for forty hours per week and received four hours credit on his time sheets for each service call he made. These calls never took more than four hours to complete. There is no evidence that the calls averaged over 2-2/3

hours, which would be the time worked to make the 4 hours credit compensation at 1-1/2 the base rate

Bright states that after having worked for several weeks at his new job, a co-worker told him the hospital had a written policy of paying overtime for on-call duty. Bright argues that this policy applied to him and entitled him to overtime pay. The hospital points to the Employee Policy Manual given to Bright in 1982, which states on page seven that overtime work is discouraged, but if an employee must work overtime, he will receive compensatory time off. Where this is not possible, the employee will be paid in accordance with the federal wage and hour law. This is the exact arrangement described by Chatterton to Bright when he was promoted.

Bright contends that he is entitled to an additional $90,000 of compensation for the time he was on-call but

not actually working at his assigned 40-hour shift. It is unclear how Bright calculates this amount.

Summary Judgment

The party seeking a summary judgment must establish that (1) no genuine dispute exists about any material fact, and (2) the law entitles it to judgment. Fed. R. Civ. P. 56(c); Galindo v. Precision American Corp., 754 F.2d 1212, reh'g denied, 762 F.2d 1004 (5th Cir. 1985); Trevino v. Celanese Corp., 701 F.2d 397, reh'g denied, 707 F.2d 515 (5th Cir. 1983). Until the movant has properly supported the motion, no response is required. Once this is done, however, to preclude the rendition of a summary judgment, the nonmovant must present evidence demonstrating specific, contested facts that are material to the issues requiring adjudication. Fed. R. Civ. P. 56(e). For this purpose mere allegations or denials will not be sufficient. Celotex Corp. v. Catrett, 477 U.S. 317 (1986);

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Union Planters Nat. Leasing v. Woods, 687 F.2d 117 (5th Cir. 1982).

Applying the FLSA.

To determine whether time spent waiting, or on call, is compensable, courts must consider

> the agreements between the parties, the nature of the service, and its relation to the waiting time, and all the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself.

Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944). In general, whether on-call time is excluded from hours for which there must be compensation depends on the degree to which the employee is free to engage in personal activities during periods off the job when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active

work. Id. at 138. Armour & Co. v. Wantock, 323 U.S. 126 (1944).

Policy Manual as a Contract.

Whether the parties agreed that bi-monthly compensation would cover (a) only time actually worked or (b) all the time that the employee was available is a critical inquiry in this circuit for determining statutory entitlement to overtime pay. Halferty v. Pulse Drug Co., Inc., 826 F.2d 2 (5th Cir. 1987). The agreement between Bright and his employer was that he would receive compensatory time for responding to calls, and nothing for the 16-hours off the job that he carried the pager. Bright never reported any pay discrepancies in his check after Chatterton was unable to obtain cash compensation at the budget meeting.

Bright claims that a written on-call policy entitled him to extra pay, yet he admits to never having read this provision when he began his supervisory job. Apparently

Bright is relying on a July 1980 administrative policy statement, no. 3.18, which provides, "All employees who work in a department with an 'on-call' policy shall be subject to the rules and regulations of such policy." The hospital maintains that the biomedical technicians department did not have an on-call policy. Furthermore, the statement goes on to say that "department directors, assistant directors and specified supervisors are not eligible for on call pay. The above policy applies only to departments having an approved 'on call' policy. Departments must be specifically approved by the Administrator." Bright's was not an approved department. The hospital's rule is unambiguous; Bright can have no contractual right to on-call pay. In any event, policy manuals do not ordinarily make contracts and certainly do not alter written contracts. Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987).

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Of the 128 hours a week that Bright was on call, 16 hours at a maximum were spent after hours traveling and fixing equipment. Bright knew his predecessor had not been paid overtime for on-call duty, and he knew the three other employees in his department were not paid. Chatterton never specified a dollar figure that Bright would have been paid had he been successful in obtaining compensation for carrying the pager, indicating that money compensation was more of a hope than a contractual understanding.

Bright lists the ways in which his activities were circumscribed by the hospital's requirement that he be at their premises within 20 minutes of being paged:

(1) Bright was required to live within a 20 minute radius of the hospital;

(2) He could not travel more than 20 minutes away from the hospital while on call;

(3) Because the job required technical dexterity, he had to abstain from consumption of alcohol;

(4) He was foreclosed from taking outside work; and

(5) His sleep and meals were sometimes interrupted by calls.

Bright's claim fails as a matter of law because he was not contractually entitled to overtime compensation, and cases in which employee activities were substantially more restricted than Bright's were held not to have violated the FLSA. Most notable are those cases in which employees such as roustabouts and security guards had to remain on the employer's premises yet were found to not be engaged in compensable work. See Allen v. Atlantic Richfield Co., 724, F.2d 1131 (5th Cir. 1984) and Rousseau v. Teledyne Movable Offshore, Inc., 805 F.2d 1245 (5th Cir.

1986). In Rousseau the district court entered a judgment notwithstanding the verdict on a claim for compensation by offshore workers who were stationed aboard derrick barges for seven days a week, prepared to respond to emergencies during their off-duty time. Compensating the crew for eight-hour daily shifts only did not violate the FLSA. Just as these employees began their jobs with knowledge of a policy that provided for compensation for direct physical labor only, Bright knew that his on-call availability would be compensated with time, not money. Continuance of employment can be evidence of an implied agreement to the terms of that employment. Rousseau at 1248. Bright continued to work under the hospital's terms of employment without any protest except for occasional inquiries about whether he could receive monetary compensation under the next budget.

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Bright's claim that his free time was spent primarily for the benefit of his employer is, on its face, less viable than the Rousseau plaintiffs' claim. His activities were not sufficiently circumscribed to constitute work time. Given a choice between the task of responding to a pager, or remaining aboard a barge during nonworking hours, or in a factory, as the guards in Allen v. Atlantic Richfield were required to do, wearing a pager is clearly less restrictive. Obviously, standby employees based on their work premises do not have the freedom to engage in the types of personal activities that Bright had. Moreover, for the work Bright actually performed during his on-call time he received a form of compensation: time credit.

The exact same limitation of remaining in a 20-minute radius of the hospital was placed on hospital technicians in Pilkerton v. Appalachian Regional Hospitals, Inc.., 336 F. Supp. 334 (W.D. Va. 1971). The court held

the plaintiffs, x-ray technicians, were not entitled to recover for the on-call time since it was spent predominantly for their own benefit. As with the technicians, Bright was free to go shopping, read, watch television, go to the movies, visit, entertain, eat in restaurants, and to eat, play and sleep at his own convenience.

Big Picture.

In light of the fact that Northwest forced Bright to resign under contested circumstances unrelated to this dispute and that he had no contractual entitlement to on-call pay, nor were his personal activities sufficiently restricted by the employer to give rise to a colorable claim under the FLSA, this suit appears to be grounded more in a desire for revenge than vindication of a plausible right.

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Conclusion.

The undisputed facts show that Bright's on-call time was spent predominately for his own benefit rather than for the hospital's benefit, and that he was waiting to be engaged rather than engaged to be waiting. The hospital will be granted judgment.

Signed on August 3, 1988, at Houston, Texas.

signature

Lynn H. Hughes
United States District Judge

APPENDIX B

Frederick George BRIGHT,
Plaintiff–Appellant,

v.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC.,
Defendant–Appellee.

No. 88–2884.

United States Court of Appeals,
Fifth Circuit.

July 2, 1991.

Former employee brought suit for overtime compensation under Fair Labor Standards Act. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., granted employer's motion for summary judgment, and employee appealed. The Court of Appeals, 888 F.2d 1059, reversed, and rehearing was sought. Upon granting rehearing en banc, 898 F.2d 968, the Court of Appeals, Garwood, Circuit Judge, held that, as a matter of law, on–call time spent by employee at home

or at other locations of his choosing substantially removed from employer's place of business was not "working time" in instances where employee was not actually called.

Affirmed.

Jerre S. Williams, Circuit Judge, with whom Johnson, Circuit Judge, joined, dissented and filed opinion.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE-WIENER and BARKSDALE, Circuit Judges.[1]

GARWOOD, Circuit Judge:

This is a former employee's suit for overtime compensation under section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1). The

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[1] Judge Emilio M. Garza was sworn in June 7, 1991, and elected not to participate in this en banc decision.

question presented is whether "on-call" time the employee spent at home, or at other locations of his choosing substantially removed from his employer's place of business, is to be included for purposes of section 7 as working time in instances where the employee was not actually "called." The district court granted the motion for summary judgment of the employer, defendant-appellee Houston Northwest Medical Center Survivor, Inc. (Northwest), ruling that this on-call time was not working time and dismissing the suit of the employee, plaintiff-appellant Frederick George Bright (Bright). A divided panel of this Court reversed and remanded. 888 F.2d 1059 (5th Cir. 1989). Disagreeing with the panel majority's contrary conclusion, this Court en banc now holds that the undisputed facts afford no basis for a finding that the employee's on-call time was working time for purposes of section 7. We accordingly affirm the district court's summary judgment for the employer.

Facts and Proceedings Below

Bridge went to work for Northwest at its hospital in Houston in April 1981 as a biomedical equipment repair technician, and remained in that employment until late January 1983 when, for reasons wholly unrelated to any matters at issue here, he was in effect fired. Throughout his employment at Northwest, Bright worked a standard forty-hour week at the hospital, from 8:00 a.m. to 4:30 p.m., with half an hour off for lunch, Monday through Friday, and he was paid an hourly wage. Overtime in this standard work week was compensated at time and a half rates, and it was understood that overtime work required advance approval by the department head, Jim Chatterton. When Bright started at the hospital, his immediate supervisor was Howard Culp, the senior biomedical equipment repair technician. Culp had the same work schedule as Bright. However, through his off-duty hours, Culp was required to wear an electronic paging device or

"beeper" and to be "on call" to come to the hospital to make emergency repairs on biomedical equipment. Culp, as Bright knew, was not compensated for this "on-call" time (although Culp apparently was compensated when he was called). In February 1982 Culp resigned, and Bright succeeded him as the senior biomedical equipment repair technician and likewise succeeded Culp in wearing the beeper and being on call through all his off-duty time. Bright remained in that role throughout the balance of his employment at Northwest. The only period of time at issue in this lawsuit is that when Bright had the beeper, namely from February 1982 to the end of his employment in January 1983.

Bright was not compensated for his on-call time, and knew this was the arrangement with him as it had been

with Culp.[2] During the "on-call" time, if Bright were called, and came to the hospital, he was compensated by four hours compensatory time at his then regular hourly rate (which apparently was some $9 or $10 per hour) for each such call. This compensation was effected by Bright simply working that many less hours the following workday or days: for example, if Bright were called on a Monday evening, he might work in his regular workshift only from 8:00 a.m. until noon on the following Tuesday, but would be paid for the entire eight hours on that day. There is no evidence that these calls on average (or, indeed, in any given instance) took as much as two hours and forty minutes (two-thirds of four hours) of Bright's time. This

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[2] Bright was told that efforts were being made to have a future hospital budge contain provision for some unspecified character of compensation in respect to his on-call and beeper status; but it was clear that this would only apply to periods after such a budget were approved (and would not be "retroactive"); as Bright knew all along, no such budget was ever approved.

case does not involve any claim respecting entitlement to compensation (overtime or otherwise) for time that Bright actually spent pursuant to a call from Northwest received while he was on call.[3]

It is undisputed that during the on-call time at issue Bright was not required to, and did not, remain at or about the hospital or any premises of or designated by his employer. He was free to go wherever and do whatever he wanted, subject *only* to the following three restrictions:

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[3] The parties stipulated below that the only issue remaining in the case was overtime compensation (and liquidated damages, attorneys' fees, and costs in respect thereto) for time, after February 2, 1982, during which plaintiff

> "was not required to remain on Defendant's premises [but] he was required to wear an electronic paging device in order that he could be contacted by Defendant and required to return and report to the hospital during periods when Plaintiff was not regularly scheduled to be working and when he was not responding to Defendant's requirement (via said electronic paging device) that Plaintiff return and report to the hospital."

(1) he must not be intoxicated or impaired to the degree that he could not work on medical equipment if called to the hospital, although total abstinence was not required (as it was during the daily workshift); (2) he must always be reachable by the beeper; (3) and he must be able to arrive at the hospital within, in Bright's words, "approximately twenty minutes" from the time he was reached on the beeper. Bright's answer to interrogatories reflect that in February 1982, when he commenced wearing the beeper and being on call, he was living about three miles, on average a fifteen-minute drive, from the hospital, but that in about July 1982 he moved his residence to a location some seventeen miles, on average a thirty-minute drive, from the hospital, and continued living there throughout all the remaining some five or six months of his Northwest employment. In his deposition, Bright said that this move was made with Northwest's specific prior approval; he also then described the driving time as some twenty-five

minutes, which he stated his employer said "would be sufficient time." On deposition Bright admitted while on call he not only stayed at home and watched television and the like, but also engaged in other activities away from home, including his "normal shopping" (including supermarket and mall shopping) and "occasionally" going out to restaurants to eat. While the record does not reflect all of Bright's activities while on call, it is *undisputed* that the only restrictions imposed on him were the three above noted. It is also clear that while on call Bright did no work for Northwest—apart from being in the on-call status and what he did, and was fully and appropriately compensated for, pursuant to actually being called. Bright also testified on deposition that he was "called" on "average" two times during the working week (Monday through Friday) and "ordinarily two to three times" on the weekend.[4]

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[4] Bright would thus have received sixteen to twenty hours of compensatory time in an average week.

Bright filed the instant suit for overtime compensation under section 7 of the FLSA in October 1983. Discovery proceeded through 1986, during which Northwest moved for summary judgment. The district court granted the motion in August 1988, concluding that under the undisputed evidence the on-call time (apart from that spent responding to calls, which was not in issue) was not compensable or working time under section 7.

Discussion

At issue here is whether the time Bright spent on call, but uncalled on, is working time under section 7, which provides in relevant part as follows:

> "Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

As the case was resolved below by granting Northwest's motion for summary judgment after ample time for discovery, and as Bright would have had the burden of proof on the dispositive issue at trial, we review the record to determine whether it contains sufficient summary judgment evidence to support a finding that Bright's on-call time, when he performed no active service for Northwest, was working time for purposes of section 7. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 2510-12, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The relevant facts recited above are not genuinely disputed, and we conclude that the record reflects no genuine issue of material fact and contains no evidence sufficient to support a finding that Bright's on-call time at issue was working time. Accordingly, the district court did not err in granting Northwest's motion for summary judgment.

Bright urges, and the panel majority apparently agreed, that under the decisions in *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), handed down the same day, the question whether such on-call time is working time is necessarily one of fact, thus precluding summary judgment or a directed verdict. This is not our reading of those decisions. Neither involved a summary judgment or a directed verdict or a discussion of the propriety of such a disposition. The thrust of the opinions in this respect was that whether waiting time was working time "is a question dependent upon all the circumstances of the case," *Armour* 65 S.Ct. at 168, as to which "[e]ach case must stand on its own facts", *Skidmore* 65 S.Ct. at 164, for the Court could not lay down a single "legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time." *Id.* 65 S.Ct. at 163.

But to state, as this language does, that the particular facts in each case are determinative, is not to say that where those discrete facts are found the resulting categorization as working or nonworking time is also necessarily always a factual rather than a legal question. Indeed *Skidmore* expressly recognizes that "[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Id.*[5] Obviously, the Court does not

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[5] We recognize that in the second sentence before this *Skidmore* states: "[W]hether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court," citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S.Ct. 332, 337, 87 L.Ed. 460 (1943). *Skidmore* 65 S.Ct. at 163. Taken in context, we believe this language is properly understood as describing the dependency of the coverage question on the particular facts as found in each discrete case, a view that is reinforced by the citation to the portion of *Jacksonville Paper Co.*, where the Court approves a remand for new factual findings, observing that "[i]f a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations [citation omitted] the question of the Act's coverage depends on the special facts pertaining to the particular business." *Jacksonville Paper*

mean that the *same* set of facts may lead to different results, but rather that the different facts of discrete cases may produce different results.

Here, the undisputed facts show that the on-call time is not working time. In such a setting, we have not hesitated to so hold as a matter of law. *See, e.g., Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 374 (5th Cir. 1987) ("'*Stare decisis* means that like facts will receive like treatment in a court of law.'"); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247 & n. 1 (5th Cir. 1986) (summary judgment as to offshore barges).

Armour and *Skidmore* clearly stand for the proposition that, in a proper setting, on-call time may be working time for purposes of section 7. But those decisions *also* plainly imply that is *not* true of employer-related

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Co., 63 S.Ct. at 337.

on-call time in *all* settings. In *Skidmore* the Court noted, with at least some degree of implied approval, the administrative interpretations that

> "[i]n some occupations . . . periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily 'has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits.' Exclusions of all such hours the Administrator thinks may be justified." *Id.* 65 S.Ct. at 163-64.

In *Armour* the plaintiffs were firemen who worked a regular 8:00 a.m. to 5:00 p.m. shift, and then were on call at the employer's premises from 5:00 p.m. until 8:00 a.m. of the following day, after which they had 24 wholly unrestricted hours, and then repeated the cycle. The Court observed that

> "[t]he litigation concerns the time [5:00 p.m. to 8:00 a.m.] during which these men were required to be on the employer's premises, to some extent amenable to the employer's discipline, subject to call, but not engaged in any specific work. The Company provided cooking equipment, beds, radios, and facilities for cards and amusements with which the men slept, ate, or entertained themselves pretty much as they chose. They were not, however, at liberty to leave the premises except that, by permission of the watchman, they might go to a nearby restaurant for their evening meal." *Id.* 65 S.Ct. at 166.

Armour sustained the district court's determination, which had been affirmed by the Seventh Circuit, that all this time (apart from hours presumably devoted to sleeping or eating, a matter that the plaintiffs did not appeal) was working time.[6]

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[6] In *Skidmore* the facts were similar, and the district court, which this Court had affirmed, concluded that "the time plaintiffs spent in the [employer's] fire hall subject to call to answer fire alarms does not constitute hours worked." *Id.* 65 S.Ct. at 163. The Supreme Court reversed and remanded for reconsideration because the lower court determination apparently rested on the erroneous notion that "waiting time may not be work." *Id.* 65 S.Ct. at 164.

Bright's case is wholly different from *Armour* and *Skidmore* and similar cases in that Bright did not have to remain on or about his employer's place of business, or some location designated by his employer, but was free to be at his home or at any place or places he chose, without advising his employer, subject only to the restrictions that he be reachable by beeper, not be intoxicated, and be able

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While observing the similarity to *Armour*, the *Skidmore* opinion also stated that "[t]he evidence in this case in some respects, such as the understanding as to separate compensation for answering alarms, is different [from *Armour*]." *Id.* In *Armour* there was no agreement or payment for on-call time actually spent answering an alarm (although in the suit the employer did not contest liability for such alarm answering time); but in *Skidmore* there was agreed compensation in case the employees received such a call. *See Wantock v. Armour & Co.*, 140 F.2d 356, 357 (7th Cir.), *aff'd sub nom. Armour & Co. v. Wantock, supra. See also Skidmore* 65 S.Ct. at 162. Further, in *Skidmore* the men apparently did not have to remain strictly on the employer's premises so long as they were "within hailing distance" thereof, *id.*, while no such accommodation appears to have been present in *Armour*.

to arrive at the hospital in "approximately" twenty minutes.[7] During the period in issue he actually moved his home—as Northwest knew and approved—to a location seventeen miles and twenty-five or thirty minutes away from the hospital, as compared to the three miles (and some fifteen minutes) away that it had been when he started carrying his beeper. Bright was not only able to

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[7] The administrative interpretations reflect the difference in kind between situations where the on-call employee has to remain at or about the employer's place of business and those where the on-call employee can be at home or other accessible places of his choosing. *See* 29 CFR § 785.17:

> "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call."

We recognize that these interpretations do not have the force of law and that we are not required to defer to them, although they may properly be considered as to some degree persuasive. *Skidmore,* 65 S.Ct. at 163.

carry on his normal personal activities at his own home, but could also do normal shopping, eating at restaurants, and the like, as he chose.

To hold that Bright's on-call time was working time would be inconsistent with several of our own prior decisions, as well as those in other circuits, which have determined that considerably more restrictive on-call status did not result in work time.

In *Brock*, we held clearly erroneous and reversed and rendered a district court bench trial finding that "on call" time was compensable overtime. There, the employee claimants lived relatively near the employer's pumping stations where their regular work day was 7:30 a.m. to 4:00 p.m. However, during the nonworking hours of 4:00 p.m. to 7:30 a.m. every day, one employee was required to remain "on call"; this required the employee to remain at his home where he could hear an alarm; if it went off, he would go to the station to correct the problem.

We noted that "[o]therwise, the on-call employee is free to eat, sleep, entertain guests, watch television, or engage in any other personal recreational activity, alone or with his family, as long as he is within hailing distance of the alarm and the station." *Id.* at 370 (footnote omitted). The employees were compensated for this time only in instances where they were actually called. We held that as a matter of law the on-call time was not work time for purposes of the FLSA.

In *Halferty*, we again held to be clearly erroneous the district court's finding that the on-call time was compensable overtime, and reversed and rendered judgment that it was not. There, the employee time in question was spent at home from 5:00 p.m. to 8:00 a.m. to be available for telephone calls as an ambulance dispatcher. We stated that in these cases "the critical issue . . . is whether the employee can use the time effectively for his or her own purposes." *Id.*, 864 F.2d at 1189. We held that

as a matter of law the plaintiff there could use the time effectively for her own purposes and that she was hence not entitled to recover, stating:

> "The facts show that Halferty could visit friends, entertain guests, sleep, watch television, do laundry, and babysit. We, therefore, conclude that she could use the time for her own purposes and that she is not entitled to compensation for her idle time. . . ." *Id.*

We noted that "[e]mployees who have received compensation for idle time generally have had almost no freedom at all." *Id.* at 1190. And, we cited and relied on, among other cases, *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988), and *Pilkenton v. Appalachian Regional Hospitals, Inc.*, 336 F.Supp. 334 (W.D.Va. 1971).

In *Norton*, the plaintiffs were van drivers who transported railroad crews at irregular and unpredictable intervals. During the disputed on-call time, "drivers must be near enough to the employer's premises to be able to respond to calls within fifteen to twenty minutes." 839 F.2d

at 654. They were only compensated, however, in the event they were actually called. They argued "that the unpredictability of assignments and the short response time which they are allowed preclude their using this waiting period for their own purposes." *Id.* (footnote omitted). The district court judgment for the employer was affirmed, the Tenth Circuit noting that the "drivers spent their time between assignments at the homes of friends, at church, at laundromats, at restaurants, at pool halls, and at a local gymnasium" and that "a simple paging device, which the drivers are free to purchase and to use, would have allayed the necessity of remaining by a phone." *Id.* at 655-56.

In *Pilkenton*, the on-call employees had beepers and had to remain within an "approximately twenty minutes" drive from their employer's hospital during their on-call time. That time was held noncompensable (except for instances where they were called).

Also to be considered are our decisions in *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131 (5th Cir. 1984), and *Rousseau*. In *Allen*, guards at a plant under strike from early January to the end of March were required to remain at the plant twenty-four hours a day, during twelve of which they were on duty, and during the other twelve they "were free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music. . . ." 724 F.2d at 1137. They were not compensated for this off-duty time (except that if, in any emergency, they were called to work during the off-duty time they were paid for that work). We upheld a verdict for the defendant that this off-duty time was not compensable.

In *Rousseau*, the claimant employees worked on derrick barges for seven-day shifts, twelve hours each day; during the other "off" twelve hours, however, they were required to remain on the barges and to be available for emergency work. They were compensated only for the time

they actually worked, not for any of the twelve-hour waiting time (except for such actual work as they might do during that time) spent on the barges. The requirement that the employees remain on the barges was applicable not only when the barges were offshore, but also when the barges were docked. The district court granted the employer's motion for summary judgment with respect to the off-duty time spent on the barges when they were offshore, and, following a bench trial, granted judgment for the employer as to the off-duty time spent on the barges while they were docked. 805 F.2d at 1247 & n. 1. We affirmed, relying on the statement in the district court's opinion that "[t]he stipulated facts and evidence show that during their off duty time on the barges, the plaintiffs were free to sleep, eat, watch television, watch VCR movies, play pingpong or cards, read, listen to music, etc." *Id.* at 1248.

As noted, we have described "the critical issue" in cases of this kind as being "whether the employee can use

the [on-call] time effectively for his or her own purposes." *Halferty,* 864 F.2d at 1189. This does not imply that the employee must have substantially the same flexibility or freedom as he would if not on call, else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject. Only in the very rarest of situations, if ever, would there be any point in an employee being on call if he could not be reached by his employer so as to shortly thereafter—generally at least a significant time before the next regular workshift could take care of the matter—be able to perform a needed service, usually at some particular location.

Within such accepted confines, Bright was clearly able to use his on-call time effectively for his own personal purposes. Indeed, it is evident that he was *much more* able to do so than the employees in the above discussed cases whose on-call time was held to be nonworking time.

Unlike the employees in *Brock* (restricted to home or plant), *Halferty* (restricted to home), *Rousseau* (restricted to barge), and *Allen* (restricted to plant), Bright was not restricted to any one or a few fixed locations, but could go virtually anywhere within approximately twenty minutes of the hospital, and indeed he lived (and moved to) approximately seventeen miles and thirty minutes away from the hospital. Within that limit, anything was permissible, except excessive alcohol consumption. An approximately twenty minute radius was involved in *Pilkenton* and fifteen to twenty minutes in *Norton.* We have found no unreversed decision holding compensable on-call time that afforded even nearly as much freedom for personal use as did Bright's. Had the twenty to thirty minute "leash" been longer, Bright would, of course, have been able to do *more* things, but that does not mean that within the applicable restrictions he could not effectively use the on-call time wholly for his own private purposes.

Millions of employees go for weeks at a time without traveling more than seventeen miles from their place of employment.

The panel majority did not disagree with our prior decisions. Rather, it placed crucial reliance on the fact that Bright throughout the nearly one year in issue never had any relief from his on-call status during his nonworking hours. The panel majority states that Bright's case "differs from . . . other cases in one important respect: Bright . . . never had any reprieve from on-call duties," *Bright,* 888 F.2d at 1061; "the restrictions only applied to the workers in *Rousseau* for seven days at a time," which it described as "the critical fact," *id.* at 1063; *Allen* was distinguished because "of critical importance is the fact that the arrangement was a temporary one, lasting only the length of the strike," *id.* (footnote omitted). In essence, the panel majority inferentially conceded that for any given day or week of on-call time, Bright was as free to use the time

for his own purposes as were the employees in the above-cited cases where the time was held nonworking. But the panel majority claims that a different result should apply here because Bright's arrangement lasted nearly a year.

We are aware of no authority that supports this theory, and we decline to adopt it, just as we did in *Brock*. There we rejected the district court's attempted distinguishment of *Allen* on the basis that the "off-shift waiting time was temporary since the strike lasted only three months." *Brock*, 826 F.2d at 374. We responded: "This circumstance is irrelevant. 'Compliance with the FLSA is not excused for even temporary periods of time." *Id.*

Further, the FLSA is structured on a workweek basis. Section 7, at issue here, requires time and a half pay "for a workweek longer than forty hours." What Bright was or was not free to do in the last week in September is

wholly irrelevant to whether he worked any overtime in the first week of that month. As we said in *Halferty,* the issue "is whether the employee can use the time effectively for his or her own purposes," and that must be decided, under the statutory framework, on the basis of each workweek at the most.

We do not deny the obvious truth that the long continued aspect of Bright's on-call status made his job highly undesirable and arguably somewhat oppressive. Clearly, it would have been vastly more pleasant from Bright's point of view had he only been on call the first week of every month, for example. But the FLSA's overtime provisions are more narrowly focused than being simply directed at requiring extra compensation for oppressive or confining conditions of employment. A Texan working 8:30 p.m. to 3:00 a.m. six days a week (thirty-nine hours), fifty-two weeks a year, at a remote Alaska location has a most restrictive and oppressive job

that as a practical matter presents, *inter alia*, vacations, visiting relatives, and attending live operatic performances or major league sporting events, but it seems obvious that the FLSA overtime provisions provide no relief for those oppressive and confining conditions. Bright's job was oppressive and confining in many of the same ways, but it, too, did not involve more than forty hours work a week.[8]

The district court properly granted summary judgment for Northwest, and that judgment is accordingly

AFFIRMED.

JERRE S. WILLIAMS, Circuit Judge, with whom JOHNSON, Circuit Judge, joins, dissenting:

I dissent from the decision of the en banc court in this case. The posture in which the case is presented to us and the use of irrelevant authority reveals that the conclusion on the critical issue is in error. The facts as

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[8] Except in instances, not at issue here, where the extra work was compensated consistently with section 7.

stated in the opinion for the Court are accurate insofar as they go. The need supplementation by way of emphasis. The panel opinion and this dissent are grounded wholly on the circumstance which must be accepted as true that for a period of approximately eleven months from February 1982 to January 1983, employee Bright's life was significantly circumscribed by his employer without compensation. There was no relief by way of other employees sharing the duties so that Bright would have periods of being free from the restrictions. There were no free weekends, there was no vacation, there were no free days or nights. This is the core issue in the case.

Under these circumstances, the Court abandons its proper role by affirming a summary judgment that Bright was not working during any of the time periods he was stringently limited in his activities by the employer but was not required to be on the premises. The Supreme Court established the authority which controls this case in the two

landmark cases of *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). When there is any likelihood that the restrictions resulting from on-call time can amount to work time "[w]hether in a concrete case such time falls within or without the Act is a *question of fact* to be resolved by appropriate findings of the trial court." *Skidmore*, 323 U.S. at 136-37, 65 S.Ct. at 163 (emphasis added).

Further, the court or the jury in making the determination as to whether such time is work time is not required to find all or nothing—that the full 16 hours away from the plant and 24 hours on weekends is or is not work time. *Skidmore* and *Armour* recognized that time spent typically in sleeping, eating, and normal recreation, could properly be found not to be work time under such circumstances. The critical point is that the unique fact in this case, the failure of the employer to provide any relief

24 hours a day, 7 days a week, for the entire 11 month period raises a fact issue as to the extent of work time.

I do not go into detail to comment upon the cases discussed and treated as controlling by the majority opinion of the en banc court. None of them control. Every single one of them, without exception, involves a situation where the employer had more than one employee sharing the oppressive schedule or there was some other means of "covering the employee" so that the employee was not committed and under serious limitations without respite over a substantial period of time. These cases are discussed and distinguished in detail in the panel opinion, *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 888 F.2d 1059, 1062–1064 (5th Cir. 1989).

The nearest case to the facts of this case has to do with the employee Pilkenton, who was on a schedule with virtually the identical restrictions as Bright. *Pilkenton v. Appalachian Regional Hosps., Inc.*, 336 F.Supp. 334

(W.D.Va. 1971). But in *Pilkenton* another employee shared the on-call duty so that each employee was freed of the duty and personal limitations for half of his or her overall time. Thus, the employees were not being held on a permanent 20 minute leash.

At the end, the opinion for the Court falls back, as it must, upon the proposition that Bright was in the same situation as someone holding a job in a remote part of Alaska where, after an eight hour day, the use of his or her own time obviously is limited. This reliance is wholly foreign to the thrust of the Fair Labor Standards Act. Admittedly, there are jobs which because of location are in isolated areas. That is in the nature of the jobs. But the isolation is not the result of the employer's direction requiring employee on-call availability during off-duty hours. The employer has nothing to do with the restricted recreational and living accommodations in an isolated job. That is not an on-call situation at all. In contrast, here it

is the employer who is enforcing a unique restriction upon a particular employee as part of the particular on-call work assignment. This is of the essence of the thrust of potential work time under the Fair Labor Standards Act.

This distinction can be seen more clearly if in an extreme case the employer directed a particular employee permanently to remain behind on the hospital campus for an hour each day after the workshift was over in case some problem arose about the changeover from one shift to another. The employee would be free to read a book, watch television, walk around the grounds, but would be required to remain on the grounds for an hour in case the employee was needed. It would be exceedingly difficult to hold that particular hour was not work time. It would be an additional on-call restriction for the benefit of the employer placed upon the employee for an extra hour every day but without compensation.

Bright's case, of course, is not that extreme in its restriction. But it is not a remote location case caused by the nature of the work applicable to all jobs. It is an on-call isolation case caused by the employer's own orders defining the particular work assignment. Thus, we are left, as the panel opinion said, with the circumstance in which Bright "was not far removed from a prisoner serving a sentence under slightly relaxed house arrest terms. He never could go to downtown Houston, he never could go to Galveston and see the ocean. He never could go to a baseball or football game in the Astrodome. An out of town event, even a visit to relatives or friends in San Antonio or Austin, was totally out of the question." *Bright*, 888 F.2d at 1064. Further, the employer had a relatively simple and humane means of avoiding this restriction which was akin to and rather close to house arrest. The remedy is found in every single one of the cases cited by the majority opinion and relief upon by the majority opinion.

The employer could have set up a system under which this onerous restrictive duty could be shared or certain periods of relief could be afforded.

Finally, the opinion for the Court asserts that all overtime issues under the statute must be based upon a week by week analysis. We have said this in a case where it is relevant, but there are instances where the courts have recognized that the week by week test is not adequate. While the FLSA calls for the calculation of the payment of overtime on a weekly basis, it does not request that each individual week be a wholly separate entity in determining whether an employee is working or not.

In *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131 (5th Cir. 1981) (cited in the en banc opinion), we considered a case in which security personnel because of a strike were required to remain on the grounds of the industrial establishment for 24 hours every day for a period of what was apparently the first few weeks of an eleven week strike.

Later, arrangements were made during the strike to rotate the 24 hour duty. The jury found that the security employees were not working during this period when they were off duty although they were required to remain at the plant. We upheld the jury verdict.

We can draw two authoritative conclusions from our decision in this case. First, the opinion makes no reference to a week by week limitation but instead assumed that the entire time during which the 24 hour requirement was in effect was relevant to the work time issue. Second, the case shows that we can and should trust juries in these cases to deny bonanzas to unfounded claims of extra work. The jury found no additional work time in that relatively short period of a few weeks involved in *Allen*.

Bright may not be able to prove to a jury that he was entitled to additional work time credit. Further, the restrictions may not have been as stringent as the record which we must now accept indicates. But I dissent because

this is not a case for summary judgment. A trial is necessary to assess the facts of this case. As the Supreme Court held in *Skidmore,* the determination of whether on-call time falls under the FLSA is highly fact-specific. There is a total absence of any authority which goes even close to the extreme presented to us as to the permanent, unrelenting, restrictions placed upon Bright's time by his employer. Thus, it was error to affirm the summary judgment of the district court. Bright is entitled to a jury trial on the facts presented to us. The well-established requirement of the Fair Labor Standards Act that on-call time can constitute work time requires this result and prompts this dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2884

FREDERICK GEORGE BRIGHT,

Plaintiff-Appellant,

versus

HOUSTON NORTHWEST MEDICAL
CENTER SURVIVOR, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(AUGUST 12, 1991)

Before CHIEF JUDGE CLARK, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, and BARKSDALE, Circuit Judges.

APPENDIX D

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(signature – GARWOOD)
United States Circuit Judge

APPENDIX D

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1295 of this title.

REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 225(a), 933(a)(1) and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62

of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Jan. 28, 1915, ch. 22, § 2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, § 412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First," "Second," and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed.,

relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate

jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

APPENDIX E

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties;

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade

Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station

licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

APPENDIX E

28 U.S.C. § 1337

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies; *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to

which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

29 CFR § 785

Subpart A—GENERAL CONSIDERATIONS

Section 785.1—INTRODUCTORY STATEMENT.

Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage. Section 7 of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these

principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

Subpart B—PRINCIPLES FOR DETERMINATION OF HOURS WORKED

Section 785.5— GENERAL REQUIREMENTS OF SECTION 6 AND 7 OF THE FAIR LABOR STANDARDS ACT.

Section 6 requires the payment of a minimum wage by an employer to his employees who are subject to the act. Section 7 prohibits their employment for more than a specified number of hours per week without proper overtime compensation.

Section 785.6—DEFINITION OF "EMPLOY" AND PARTIAL DEFINITION OF "HOURS WORKED".

By statutory definition the term "employ" includes (section 3(g)) "to suffer or permit to work." The act, however, contains no definition of "work." Section 3(o) of the Fair Labor Standards Act contains a partial definition of "hours worked" in the form of a limited exception for clothes-changing and wash-up time.

Section 785.7—JUDICIAL CONSTRUCTION.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business." (*Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123,* 321 U.S. 590 (1944).) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which

the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity." Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944).) The workweek ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).) The Portal-to-Portal Act did not change the rule

except to provide an exception for preliminary and postliminary activities. *See* § 785.34.

Section 785.8—EFFECT OF CUSTOM, CONTRACT, OR AGREEMENT.

The principles are applicable even though there may be custom, contract, or agreement not to pay for the time so spent, with special statutory exceptions discussed in §§ 785.9 and 785.26.

Subpart C—APPLICATION OF PRINCIPLES

WAITING TIME

Section 785.14—GENERAL

Whether waiting time is time worked under the act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation

to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." (*Skidmore v. Swift,* 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (*Central Mo. Tel. Co. v. Conwell,* 170 F.2d 641 (C.A. 8, 1948))

Section 785.16—OFF DUTY.

(a) *General.* Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to

use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, D.C., to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip, the idle time is not working time. He is waiting to be engaged. (*Skidmore v. Swift,* 323 U.S. 134, 137 (1944); *Walling v. Dunbar Transfer & Storage,* 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn.

1943); *Gifford v. Chapman*, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla. 1947); *Thompson v. Daugherty*, 40 F.Supp. 279 (D.Md. 1941))

Section 785.17—ON-CALL TIME.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Handler v. Thrasher*, 191 F.2d 120 (C.A. 10, 1951); *Walling v. Bank of Waynesboro, Georgia*, 61 F.Supp. 384 (S.D. Ga. 1945))

29 U.S.C. § 207(a)(1)

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in any enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

. . . . . .

APPENDIX H

29 U.S.C. § 216(b)

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the

preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendants and costs of action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in

the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

APPENDIX I

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared FREDERICK GEORGE BRIGHT, who, being by me duly sworn did on his oath depose and say:

1. " I have personal knowledge of the facts and matters contained within this affidavit and they are true and correct.

2. " I am competent in every respect to make this affidavit.

3. "I was employed by the Defendant, HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC., from approximately April, 1981 through January 21, 1983.

APPENDIX J

4. "When I was initially employed I was employed under an oral agreement supplemented by written hospital policies that called for me to provide repair and maintenance services to the hospital's biomedical equipment. I was required to work forty (40) hours per week, comprised of five (5) eight-hour shifts. From time to time I worked overtime and was compensated at a rate equal to one and one-half times my regular rate.

5. "On or about February 2, 1982, when my predecessor, Howard Culp, quit I was given the pager previously worn by him and told that in addition to my regular shift work that I would be on-call at all times when I was not at the hospital.

6. "I had no non-competition agreement with HOUSTON NORTHWEST MEDICAL CENTER, and to my knowledge received no additional compensation for wearing the pager.

APPENDIX J

7. "During the time that I was employed by HOUSTON NORTHWEST MEDICAL CENTER, certain employees in other departments were paid for on-call time. That is to say, during those periods of time that they were on-call, they received a stipulated hourly compensation for each of such hours. In addition to that sum they were paid four (4) hours compensation on each occasion that they were called in to the hospital while on-call.

8. "At the time I was given the pager and required to wear it, I was told that at all times I would have to be able to report to the hospital within no more than approximately twenty minutes form the time that I was paged and it was clearly understood that if paged my condition was such that when I reached the hospital I was capable of analyzing and repairing complex biomedical equipment such as defibrulators, infusion pumps, hypothermia units, cardiac monitors, blood pressure

monitors, various types of vacuum devices, incubators, fetal monitors and electrosurgical devices, among others.

9. "While I was not required to remain near or on any specific means of transportation, I was required to be within a distance such that I could walk on the hospital in twenty minutes or arrive there using some other means of transportation as I chose.

10. "When I moved my residence to one located at 27311 Spring Wood Drive, Magnolia, Texas, located in South Montgomery County, and informed Paul Kaufman that I was so doing, Paul Kaufman required that I time the distance from my house to the hospital and further required that a pager test be run by me and the hospital to determine if the pager could be received at my home.

11. "During such time that I was not at the hospital and was wearing a pager, it was made clear to me by Jim Chatterton that I should not drink more than a

small amount of an intoxicating beverage at any time in order that my faculties not be impaired if I were paged and required to return to the hospital.

12. "During the approximate one-year period that I wore the pager and was on-call, things that I had been previously able to do with my off-time were now unavailable to me. Examples of such restrictions, while not exhaustive, are as follows:

a. "My wife and I were unable to visit friends in Houston and the Houston area whose residence was more than twenty minutes from the hospital.

b. "My wife and I had, in the past, enjoyed traveling to Austin and San Antonio on weekends for rest and relaxation and visiting friends in each of those towns. However, since both were far beyond the

twenty-minute radius imposed by the hospital, we were unable to go.

c. "Prior to going on-call, I was able to supplement my income from time to time by doing part-time work for friends, acquaintances and other people. However, after going on-call, I could no longer perform those services, because they either took me more than twenty minutes from the hospital or required more than twenty minutes to complete.

d. "My wife and I could not go on vacation, if that vacation entailed traveling more than twenty minutes from the hospital.

e. "My wife and I could enjoy a party or recreational situation where alcoholic beverages were consumed to the same extent

as other person present, because my faculties had to be unimpaired at all times in the event I were called into the hospital and required to repair equipment necessary to preserve a patient's life.

13. "The on-call restrictions additionally precluded or severely limited my ability to further my education in the field of electronics, because being constantly on-call and being called frequently interfered with my ability to study and to attend classes.

14. "On many occasions I have been required to interrupt my sleeping time and to return to the hospital or to answer questions concerning maintenance of equipment over the telephone, thereby severely interrupting my sleep.

15. "On several occasions I was required to interrupt my sleep, return to the hospital in order to perform a maintenance function; thereafter, allowed to

return home and within a few minutes of the time that I returned home, was required to again return to the hospital to repair or service another item of equipment.

16. "I requested that the hospital provide additional personnel in the Biomedical Equipment Repair Department to relieve me and to work on weekends. However, the hospital did not do so, refusing to pay sufficient compensation to an adequately trained person. As such, I was required to provide all of the maintenance service for the hospital's biomedical equipment, either during my regularly scheduled hours or by being called in while on-call.

17. "Attached to this affidavit as Exhibit "A" is a letter dated April 6, 1982, concerning my responsibility and availability to service equipment in the hospital at any time.

"Further Affiant saith not."

(signature)
FREDERICK GEORGE BRIGHT

SUBSCRIBED AND SWORN to before me on the 12th day of August, 1985.

(Carol Marshall)
Notary Public in and for the State of Texas

APPENDIX J

Maintenance
Jim Chatterton

Houston Northwest Medical Center, Inc.

April 6, 1982

M E M O R A N D U M

TO: DEPARTMENT DIRECTORS and ADMINISTRATIVE STAFF

FROM: PAUL KAUFFMAN
Associate Administrator

SUBJECT: MANAGER, BIOMEDICAL EQUIPMENT REPAIR

Announcement is made of the appointment of Mr. Fred Bright as Manager of our Biomedical Equipment Repair Service. Fred is responsible for the preventive maintenance, inspection and repair of all hospital biomedical equipment not on a service contract.

APPENDIX J

As technician in our hospital and with previous experience in the field, Fred has proven himself as a knowledgeable, conscientious and cooperative individual who is committed to close support of all nursing units and ancillary departments.

(signature)
PAUL KAUFMAN

PK:jw

cc: Bill Carlisle

Exhibit "A"

APPENDIX J

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FREDERICK GEORGE BRIGHT – PETITIONER

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. – RESPONDENT

PROOF OF SERVICE

I, MAURICE BRESENHAN, JR. do swear and declare that on this date, November 12, 1991, pursuant to Supreme Court Rule 29.3, I have served the foregoing Petition for Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing three copies of the document in the United

States mail properly addressed to each of them and with first-class postage pre-paid; the names and addresses of those served are as follows:

Ms. Gail Magers
SULLINS, JOHNSTON, RORBACH
& MAGERS
3701 Kirby Drive, Suite 1230
Houston, Texas 77098

_____
Maurice Bresenhan, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME, on this the ___ day of November, 1991 by Maurice Bresenhan, Jr.

_____
Notary Public in and for
the State of T E X A S

My Commission expires:_____

(2)

No. 91-919

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FREDERICK GEORGE BRIGHT - Petitioner

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. - Respondent

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gail Magers
3701 Kirby Drive, Suite 1200
Houston, Texas 77098
(713) 521-0221
ATTORNEY FOR RESPONDENT

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FREDERICK GEORGE BRIGHT - Petitioner

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. - Respondent

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ATTORNEY FOR RESPONDENT

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No. _____

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REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Houston Northwest Medical Center Survivor, Inc., respectfully opposes Petitioner's Petition for Writ of Certiorari to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit, which opinion affirms a summary judgment of the United States District Court for the Southern District of Texas and in support of such opposition submits the following.

JURISDICTION

The United States Supreme Court lacks jurisdiction to review the decision of the Court of Appeals. The decision of the Court of Appeals does not decide an important question of federal law in a way that conflicts with applicable decisions of this Court.

QUESTION PRESENTED FOR REVIEW

The question presented is whether the district court and the United States Court of Appeals erred in holding Plaintiff presented no evidence sufficient upon which a jury could reasonably find for the Plaintiff that his "on-call" time

spent away from his employer's place of business at locations of his own choosing and engaged in personal activities constitutes work time.

STATEMENT OF THE CASE

This is a former employee's suit for overtime compensation under section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1).

Plaintiff Frederick George Bright worked for Northwest as a biomedical equipment repair technician from April, 1981 until January, 1983 when he was fired. He worked a forty-hour week and overtime was compensated at time and a half. During the first year of employment, Bright's supervisor wore a "beeper" and was "on call" to come to the hospital and make emergency repairs on biomedical equipment. He was not paid for "on-call" time but was paid when he was called in to work. When the

supervisor resigned in February, 1982, Bright succeeded him as the senior technician and in wearing the beeper and being on call through all his off-duty time. Bright always knew the job did not pay on-call time. If Bright were called to the hospital, he was compensated for each such call.

After his regular work hours, Bright did not remain at the hospital and was free to go wherever and do whatever he wanted, as long as he could be reached by the beeper, arrive in approximately twenty to thirty minutes and not be intoxicated to the degree he could not work on medical equipment.

During on-call time, Bright's activities included "normal shopping" including supermarket and mall shopping, eating at restaurants and going to movies.

ARGUMENT AND AUTHORITIES

Both *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L.Ed. 124, 65 S.Ct. 161 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L.Ed. 118, 65 S.Ct. 165 (1944) held that no principle of law precludes waiting time from also being working time. *Skidmore*, 65 S.Ct. at 164 and *Armour*, 65 S.Ct. at 165. In both cases, unlike the present case, the employees were firemen who remained in or near their employer's place of business rather than pursuing personal activities in their homes and neighborhoods. The Court's holdings apply to those more restricted employees. For example, the Court states they "were not at liberty to go away." "Their duty was to stand and wait." *Armour*, 65 S.Ct. at 165. But unlike those cases, Bright was free to be in his home or anywhere else so long as he was approximately twenty minutes away.

While *Armour* and *Skidmore* stand for the proposition that in a proper setting, on-call time may be working time for purposes of overtime pay, they state that on-call time spend predominantly for the employee's benefit, as here, is not compensable.

In *Skidmore*, the Court looked to administrative interpretations for guidance and stated: "good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. They determine the policy which will guide applications for enforcement." *Skidmore*, 65 S.Ct. at 163.

The interpretations referred to specifically address the on-call situation illustrated in the present case where Bright could be at home or other place of his choosing and the contrasting *Skidmore* and *Armour* situations where the

employees had to remain at or about the employer's place of business. *See* 29 CFR § 785.17:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

Bright, carrying a beeper, had more freedom than a person who had to stay near a telephone.

In both *Skidmore* and *Armour*, part of the employment time was spent in periods of idleness on the employer's premises waiting on call or on standby such that while they were there, the employees were amenable to the employer's discipline and not free to leave except for their evening meal. There is a profound difference between sitting in a company fire hall and being in one's own home or in a restaurant of one's choosing.

In summary, the level of restrictions on the employee's use of his time in the instant case simply does not rise to the level of those more stringent restrictions discussed in *Skidmore* and *Armour* when the Court discusses whether waiting time can be working time. There is no evidence in the instant case that the time was spend predominantly for the benefit of the employer. In fact, all the evidence is just the opposite, that is, that Bright spent the time in the conduct of his own personal affairs and in the ordinary normal routine of living.

The courts below correctly applied the standards of *Anderson* and impliedly asked whether a fair-minded jury could return a verdict for the Plaintiff on the evidence presented. Since the mere existence of a scintilla of evidence in support of the Plaintiff's position is insufficient, there must be evidence on which the jury could reasonably find for the Plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 91 L.Ed.2d 202, 106 S.Ct. 2505. In this case none exists.

CONCLUSION

Houston Northwest Medical Center Survivor, Inc. prays this Court deny Petitioner's Application for Writ of Certiorari.

Respectfully submitted,

GAIL MAGERS
Attorney for Respondent

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FREDERICK GEORGE BRIGHT - Petitioner

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. - Respondent

PROOF OF SERVICE

I, Gail Magers, do swear and declare that on this date, December 13, 1991, pursuant to Supreme Court Rule 29.3, I have served the foregoing Reply Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope

containing three copies of the document in the United States mail properly addressed to each of them and with first-class postage pre-paid; the names and addresses of those served are as follows:

Maurice Bresenhan, Jr.
1100 Milam Bldg., Suite 2150
Houston, Texas 77002

Gail Magers
GAIL MAGERS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 13th day of December, 1991 by Gail Magers.

KIM SCHROEDER
Notary Public, State of Texas
My Commission Expires 2/27/95

Kim Schroeder
Notary Public in and for
the State of Texas

Printed Name: Kim Schroeder

My Commission Expires: 2/27/95